



## **DEPARTMENT OF AGRICULTURE**

### **Forest Service**

### **36 CFR Part 254**

**RIN: 0596-AD41**

### **Conveyance of Small Tracts**

**AGENCY:** Forest Service, USDA.

**ACTION:** Proposed rule; request for comment.

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**SUMMARY:** The United States Department of Agriculture (USDA), Forest Service is revising regulations to implement certain changes to the Small Tracts Act, enacted in the Agriculture Improvement Act of 2018, also known as the 2018 Farm Bill. These statutory changes create a new category of lands eligible for conveyance outside of the National Forest System under the Small Tracts Act for parcels of 40 acres or less that are physically isolated, inaccessible, or have lost National Forest System character. The statutory changes also create a new category of lands eligible for conveyance involving parcels of ten acres or less that are not eligible for conveyance under previous eligibility conditions and are encroached on by a permanent habitable improvement for which there is no evidence that the encroachment was intentional or negligent. These amendments to the Small Tracts Act are expected to provide the Forest Service with more flexibility for resolving property conflicts with private landowners, reduce the time and expense arising from a protracted boundary dispute, and alleviate management burden and expense to the Forest Service.

**DATES:** Comments must be received in writing by **[INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER.]**

**ADDRESSES:** Written comments concerning this notice should be addressed to Greg Smith, USDA, Forest Service, 201 14<sup>th</sup> Street, SW, Washington, D.C., 20250. Comments also may be submitted by following the instructions at the Federal eRulemaking portal at <http://www.regulations.gov>. If comments are sent by email, the public is requested not to send duplicate comments via regular mail. All comments, including names and addresses when provided, are placed in the record and made available for public inspection and copying. The public may inspect comments received at 201 14<sup>th</sup> Street, SW, Washington, D.C., 20250. Visitors are encouraged to call ahead to 202-205-3563 to facilitate entry to the building.

**FOR FURTHER INFORMATION CONTACT:** Brad Tait, by phone at 971-806-2199, or via email at [bradley.tait@usda.gov](mailto:bradley.tait@usda.gov). Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

Public Law 97-465, commonly known as the Small Tracts Act (16 U.S.C. 521c-521i), was enacted in 1983 to help the Forest Service resolve land disputes and boundary mangement problems for parcels that generally were small in scale (less than ten acres) with land values that did not exceed \$150,000. Eligible lands for sale, exchange, or interchange included National Forest System lands encumbered by an encroachment like a shed, house, or fence; roads or road rights-of-way in excess of Forest Service transportation needs; and “mineral survey fractions,” small parcels of National Forest

System lands interspersed with or adjacent to lands transferred out of Federal ownership under the mining laws.

### **Discussion of Amendments to the Small Tracts Act**

The Small Tracts Act was amended by Section 8621 of the Agriculture Improvement Act of 2018, also known as the 2018 Farm Bill (Pub. L. 115-334). The Agriculture Improvement Act of 2018 changes to the Small Tracts Act are being implemented in two phases. The first phase, implementing statutory revisions that are self-executing, was accomplished by revisions to 36 CFR part 254 by final rule without notice and comment on February 13, 2020 (85 FR 8180). The second phase, implementing changes that may entail agency discretion, would be accomplished by this proposed rule, for which notice and comment are warranted.

The Agriculture Improvement Act of 2018 added two new paragraphs to the Small Tracts Act Section 3 (16 U.S.C. 521e) to resolve by conveyance certain encroachment, trespass, and boundary management problems: paragraph (4) (16 U.S.C. 521e(4)), adding a limited conveyance authority for parcels of 40 acres or less that are determined by the Secretary to be physically isolated from other Federal lands, to be inaccessible, or to have lost National Forest character; and paragraph (5) (16 U.S.C. 521e(5)), addressing encroachments by permanent habitable improvements on parcels of 10 acres or less. This proposed rule would implement paragraph (4) by adding a new 36 CFR 254.37, and would implement paragraph (5) by adding a new paragraph (b) to 36 CFR 254.32.

Rulemaking is required for these specific amendments because Section 6 of the Small Tracts Act (codified at 16 U.S.C. 521(h)) provides that “[t]he Secretary shall issue

regulations to carry out the provisions of this Act, including specification of . . . criteria which shall be used in making the determination as to what constitutes the public interest.” The public interest determination in § 254.36 will apply to the new paragraph 254.32(b) and new § 254.37 created by this proposed rule. Rulemaking, and particularly the solicitation of public comments, is further warranted because both amendments introduce new options to the Forest Service that rely on agency discretion for resolving eligible encroachments.

The final rule published on February 13, 2020 (85 FR 8180), added a new paragraph (c) to 36 CFR 254.32. As noted above, this proposed rule would revise 36 CFR 254.32 to add a new paragraph (b); it would accordingly redesignate existing paragraph (b) as paragraph (c), which would in turn redesignate paragraph (c) added by the final rule as paragraph (d). The final rule also added 36 CFR 254.38. This proposed rule would revise the citations to other rule provisions in 36 CFR 254.38(a) from 36 CFR 254.32(c) to 36 CFR 254.32(d), consistent with the revisions to § 254.32 that would be made by this proposed rule, and would revise 36 CFR 254.38(b) to add a subparagraph (3).

## **REGULATORY CERTIFICATIONS**

### *Executive Order 12866*

Executive Order (EO) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this proposed rule is not significant.

### *Executive Order 13771*

The proposed rule has been reviewed in accordance with EO 13771 on reducing regulation and controlling regulatory costs, and is considered an EO “deregulatory”

action.

#### *Congressional Review Act*

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

#### *Regulatory Flexibility Act Analysis*

The Agency has considered the proposed rule under the requirements of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). This proposed rule would not have any direct effect on small entities as defined by the Regulatory Flexibility Act. The proposed rule would not impose recordkeeping requirements on small entities; would not affect their competitive position in relation to large entities; and would not affect their cash flow, liquidity, or ability to remain in the market. Therefore, the Forest Service has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act.

#### *Federalism*

The Agency has considered this proposed rule under the requirements of EO 13132 *Federalism*. The Agency concluded that the proposed rule conforms with the federalism principles set out in this Executive Order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, nor on the distribution of power and responsibilities among the various levels of government. Therefore, the Agency concludes that this proposed rule does not have federalism implications.

#### *Consultation with Tribal Governments*

Tribal consultation is not required for the revisions to the Small Tracts Act

regulations to be effected in this proposed rule. Tribal consultation on individual proposed projects and local notification requirements to Tribes and other individuals for land adjustment activities will occur as required.

#### *No Takings Implications*

The Agency has analyzed this proposed rule in accordance with the principles and criteria found in EO 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights*, and has determined that the rule does not pose the risk of taking of protected private property.

#### *Controlling Paperwork Burdens on the Public*

This proposed rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR Part 1320 that are not already required by law or are not already approved for use, and therefore imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 - 3521), and its implementing regulations at 5 CFR part 1320, do not apply.

#### *National Environmental Policy Act*

Agency regulations at 36 CFR 220.6(d)(2) (73 FR 43093) exclude from documentation in an environmental assessment or impact statement “rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.” The Agency has concluded that these proposed rules fall within this category of actions and that no extraordinary circumstances exist which would require preparation of an environment assessment or environmental impact statement.

#### *Energy Effects*

This proposed rule has been reviewed under EO 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*. It has been determined that this proposed rule does not constitute a significant energy action as defined in EO 13211.

#### *Civil Justice Reform*

The Agency has analyzed this rule in accordance with the principles and criteria of EO 12988, *Civil Justice Reform*. The Agency has not identified any State or local laws or regulations that conflict with this regulation or that would impede full implementation of this rule. Nevertheless, in the event that such conflicts were to be identified, the proposed rule, if implemented, would preempt the State or local laws or regulations found to be in conflict. However, in that case, (1) no retroactive effect would be given to this proposed rule; and (2) the USDA would not require the use of administrative proceedings before parties could file suit in court challenging its provisions.

#### *Unfunded Mandates*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), the agency has assessed the effects of this proposed rule on State, local, and Tribal governments and the private sector. This proposed rule does not compel the expenditure of \$100 million or more by any State, local, or Tribal governments or anyone in the private sector. Therefore, statements as described under section 202 and 205 of the Act are not required.

#### **List of Subjects in 36 CFR Part 254**

Community facilities, National forests.

Therefore, for the reasons set forth in the preamble, the Forest Service proposes to revise part 254 of title 36 of the Code of Federal Regulations as follows:

**Part 254 -- LANDOWNERSHIP ADJUSTMENT**

**Subpart C-- Conveyance of Small Tracts**

1. The authority citation for part 254, subpart C continues to read:

**Authority:** Pub. L. 97-465; 96 Stat. 2535.

2. Amend §254.31 by adding, in alphabetical order, the definition of “Permanent Habitable Improvement” to read as follows:

**§254.31 Definitions.**

\* \* \* \* \*

*Permanent Habitable Improvement* means a dwelling, improvement, house, shed, hunting blind, or other structure presently being used as a residence or domicile for a lasting or indefinite period of time.

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3. Revise § 254.32 to read as follows:

**§254.32 Encroachments and other improvements.**

(a) This subpart allows conveyance of parcels of 10 acres or less, which will resolve encroachments by persons on NFS lands:

(1) To whom no advance notice was given that the improvements encroached or would encroach, and

(2) Who in good faith relied on an erroneous survey, title search, or other land description which did not reveal such encroachment.

(b) This subpart also allows conveyance of parcels of 10 acres or less that are not

eligible for conveyance under paragraph (a) of this section but are encroached on by a permanent habitable improvement for which there is no evidence that the encroachment was intentional or negligent.

(c) Forest Service officials shall consider the following factors when determining whether to convey lands upon which encroachments exist under paragraphs (a) and (b) of this section:

(1) The location of the property boundaries based on historical location and continued acceptance and maintenance,

(2) Factual evidence of claim of title or color of title,

(3) Notice given to persons encroaching on National Forest System lands,

(4) Degree of development in the encroached upon area, and

(5) Creation of an uneconomic remnant.

(d) This subpart also allows conveyance of parcels that are used as a cemetery (including a parcel of not more than one acre adjacent to the parcel used as a cemetery), a landfill, or a sewage treatment plant under a special use authorization issued or otherwise authorized by a Forest Service official.

4. Add § 254.37 to read as follows:

**§ 254.37 Conveyance of parcels 40 acres or less that no longer meet National Forest System objectives.**

This subpart allows conveyance of parcels of 40 acres or less that are determined by Forest Service officials to:

(a) Be physically isolated from other Federal land; or

(b) Be inaccessible; or

(c) Have lost National Forest character.

5. Amend § 254.38 by revising paragraph (a) and adding paragraph (b)(3) to read as follows:

**§ 254.38 Disposition of proceeds.**

(a) The net proceeds derived from any sale or exchange of parcels in § 254.32(b) and (d) and § 254.37 shall be deposited in the fund commonly known as the “Sisk Act” account.

(b) \*\*\*

(3) Reimbursement for costs incurred in preparing a sale conducted under § 254.37 if the sale is a competitive sale.

Dated: February 14, 2020

James E. Hubbard,  
Undersecretary,  
Natural Resources and Environment.

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